Nos. 79-1496 and 79-1501

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In the Supreme Court of the United States

OCTOBER TERM, 1979

ASSOCIATION OF NATIONAL ADVERTISERS, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, ET AL.

KELLOGG COMPANY

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

NEIL H. KOSLOWE
Attorney
Department of Justice
Washington, D.C. 20530

MICHAEL N. SOHN
General Counsel

HOWARD E. SHAPIRO
Deputy General Counsel

DAVID M. FITZGERALD
Attorney
Federal Trade Commission
Washington, D.C. 20580

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Argument	13
Conclusion	26

CITATIONS

Cases:

Action for Children's Television v. *FCC*, 564 F.2d 458	8
American Airlines, Inc. v. *CAB*, 359 F.2d 624	18
American Cyanamid Co. v. *FTC*, 363 F.2d 757	17
Cinderella Career and Finishing Schools, Inc. v. *FTC*, 425 F.2d 583	8, 17
County of Los Angeles v. *Davis*, 440 U.S. 625	24
FCC v. *National Citizens Committee for Broadcasting*, 436 U.S. 775	18
FTC v. *Cement Institute*, 333 U.S. 683	17, 23
Hampton v. *Mow Sun Wong*, 426 U.S. 88	24
Hortonville Joint School District v. *Hortonville Education Assn.*, 426 U.S. 482	23
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267	22
Preiser v. *Newkirk*, 422 U.S. 395	24
SEC v. *Medical Committee for Human Rights*, 404 U.S. 403	24

Cases—Continued Page

Texaco v. *FTC*, 336 F.2d 754, *vacated on other grounds*, 381 U.S. 739 ..... 18, 19
United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 21
United States v. *Concentrated Phosphate Export Association, Inc.*, 393 U.S. 199 .. 24
United States v. *Florida East Coast Ry.*, 410 U.S. 224 20
United States v. *Grinnell Corp.*, 384 U.S. 563 24
United States v. *Haldeman*, 559 F.2d 31, *cert. denied*, 431 U.S. 933 24
United States v. *Morgan*, 313 U.S. 409 .... 17, 23
United States v. *W. T. Grant Co.*, 345 U.S. 629 24
Velsicol Chemical Corp. v. *United States*, cert. denied, U.S. 942 25
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council*, 435 U.S. 519 23
Withrow v. *Larkin*, 421 U.S. 35 23

Constitution, statutes and regulations:

United States Constitution:

First Amendment 4
Fifth Amendment, Due Process Clause 11, 23

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 11

5 U.S.C. 553 ..... 3, 21
5 U.S.C. 553(b) 19
5 U.S.C. 556 21
5 U.S.C. 557 21

Constitution, statutes and regulations—Continued Page

Clean Water Act of 1977, 33 U.S.C. (Supp. II) 1317(a)(2) 21
Energy Policy and Conservation Act, 42 U.S.C. (Supp. II) 6306(a)(1) 21
Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*:

Section 5, 15 U.S.C. 45 ..... 2, 3, 15
Section 5(a), 15 U.S.C. 45(a) 25
Section 5(a)(1), 15 U.S.C. 45(a)(1) 3
Section 18, 15 U.S.C. 57a 2, 10, 11, 12, 14, 17, 19, 20, 21
Section 18(a)(1)(B), 15 U.S.C. 57a(a)(1)(B) 3
Section 18(b), 15 U.S.C. 57a(b) 3, 19
Section 18(c), 15 U.S.C. 57a(c)(1)(B) 19
Section 18(e), 15 U.S.C. 57a(e) .....
Section 18(e)(3)(B), 15 U.S.C. 57a(e)(3)(B) 21

Securities Act Amendments of 1975, 15 U.S.C. 78f(e)(4) 21
Toxic Substances Control Act, 15 U.S.C. 2605(c) 21

Miscellaneous:

K. Davis, *Administrative Law Treatise* (1958) 17, 18
H.R. Conf. Rep. No. 96-917, 96th Cong., 2d Sess. (1980) 13
H.R. Conf. Rep. No. 93-1606, 93d Cong., 2d Sess. (1974) 19
S. Rep. No. 597, 63d Cong., 2d Sess. (1914) 18

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-99)[1] is not yet reported. The opinion of the district court (Pet. App. A-100 to A-110) is reported at 460 F. Supp. 996.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1979 (Pet. App. A-1). The petition for a writ of certiorari in No. 79-1496 was filed on March 25, 1980, and the petition in No. 79-1501 was filed on March 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Chairman of the Federal Trade Commission should have been disqualified from participation in a Commission rulemaking proceeding because he made public statements that discussed questions of law and policy and expressed tentative assumptions of legislative fact prior to the commencement of that proceeding.

STATUTES INVOLVED

Sections 5 and 18 of the Federal Trade Commission Act, 15 U.S.C. 45 and 57a, are set forth at Pet. App. 127.

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[1] "Pet. App." refers to the appendix to the petition in No. 79-1496.

STATEMENT

1. Section 18(a)(1)(B) of the FTC Act, 15 U.S.C. 57a(a)(1)(B), empowers the Commission to prescribe rules defining "acts or practices which are unfair or deceptive * * * (within the meaning of * * * Section 5(a)(1) [of the FTC Act, 15 U.S.C. 45(a)(1)])." In a rulemaking proceeding initiated under this provision, the Commission must comply with the notice and comment requirements of 5 U.S.C. 553. See 15 U.S.C. 57a(b). In addition, the Commission must permit interested parties to conduct cross-examination and present rebuttal information with respect to disputed issues of material fact that the Commission determines are necessary and appropriate for it to resolve. See 15 U.S.C. 57a(b), (c)(1)(B).

On April 27, 1978, the Commission gave notice of a proposed rulemaking proceeding (the "Children's Advertising Proceeding") after receiving a staff report on televised advertising directed to children. The staff report was prepared in response to petitions for rulemaking filed by Action for Children's Television and the Center for Science in the Public Interest (Pet. App. A-146 to A-153). The petitions claimed that television advertising of sugared products addressed to children is both unfair and deceptive under Section 5 of the FTC Act (*ibid.*). In giving notice of its proposed rulemaking proceeding, the Commission elected not to publish the text of a proposed rule. Instead, it invited written comments on (1) the substance of the staff report (which recommended a possible remedial approach to the

problems referred to in the rulemaking petitions); (2) alternative remedial approaches not contained in the staff report; and (3) other issues raised by the staff report including the First Amendment implications of advertising regulation (Pet. App. A-141 to A-169). After the Commission received written comments pursuant to this notice, it conducted a legislative-type hearing. Interested persons then proposed disputed issues of specific fact for Commission analysis, filed requests to cross-examine witnesses who appeared at the hearing, and sought leave to present rebuttal testimony.[2]

Eleven months after these proceedings began, several associations of advertisers (petitioners in this Court) requested Chairman Pertschuk to recuse himself from participation in the Children's Advertising Proceeding. They also moved the Commission to enter an order disqualifying the Chairman, contending that he "had made public statements concerning regulation of children's advertising that demonstrated prejudgment of specific factual issues sufficient to preclude his ability to serve as an impartial arbiter" (Pet. App. A-5). The advertisers referred to a series of public statements concerning children's advertising that had been made before the rulemaking proceeding was initiated.[3] They relied principally, however, on

[2] The Commission has not yet designated any disputed issue of material fact for resolution in the Children's Advertising Proceeding.

[3] The statements that the advertisers relied on were contained in (i) an article about Mr. Pertschuk that appeared in "Advertising Age" on June 27, 1977 (Pet. App. A-170); (ii) a copy of a Commission press release discussing a meeting of Mr. Pertschuk with representatives of ACT and ten other national organizations on July 20, 1977 (*id.* at A-175); (iii) a copy of a transcript of a television interview with Mr. Pertschuk on October 31, 1977 (*id.* at A-177); (iv) a copy of a speech given by Mr. Pertschuk on November 8, 1977 (*id.* at A-186); (v) an article from "TV Guide" magazine dated November 12, 1977, reporting an interview with Mr. Pertschuk (*id.* at A-201); (vi) an article about the Children's Advertising proceeding that appeared in "The Wall Street Journal" on December 28, 1977 (*id.* at A-208); and (vii) a similar article that appeared in "Newsweek" magazine on January 30, 1978 (*id.* at A-216).

a November 1977 speech (*id.* at A-186 to A-197) ("ACT speech") in which the Chairman discussed whether the statute's prohibition of "unfair" and "deceptive" advertising might be applied to television advertising of sugared products directed at children (*id.* at A-39). Mr. Pertschuk referred to the public policy, expressed in statutory and common law authorities, against exploitation of children, and indicated that this policy was relevant to the exercise of the Commission's authority to declare a trade practice "unfair" (*id.* at A-191 to A-193). He also noted the credulousness of children (*id.* at A-189) and their lack of mature judgment (*id.* at A-193), and suggested that these factors might make children's advertising of sugared foods deceptive if that advertising did not include material information on health risks (such as tooth decay and obesity) that can result from excessive consumption of sugared products (*id.* at A-195 to A-196). Finally, he noted that any administrative action concerning children's ad-

vertising would undoubtedly produce opposition from affected business interests and that the Commission should also hear from parents, teachers, pediatricians, and dentists—*i.e.*, from health and education specialists who would express the health interests of children. He also emphasized that "[w]e must be rigorous and open-minded in our analysis of both law and fact" (*id.* at A-197).[4]

[4] The other statements relied on by the advertisers (see note 3, *supra*) anticipated or were derived from the speech summarized above. The "Advertising Age" article quoted Chairman Pertschuk as saying that a four or five year old "may not understand what advertising is about" (Pet. App. A-172). The FTC press release quoted his statement that advertising directed to children "may be unfair without being deceptive," and that "[t]he same commercial can evoke a far different set of responses in a 3 or 4 year old child's mind than in an adult's" (*id.* at A-175). The October 1977 television interview stated that "we're looking now at the question of * * * children's advertising, which, in many respects, we think pose[s] some serious problems" (*id.* at A-180). In response to questions, Mr. Pertschuk noted that television advertising directed to children is "an area of prime concern to me and to the Commission itself," that such advertising involves the "very basic question" of "the extent to which children are to be treated as commercial objects," and that he had "some serious doubt" whether television advertising should be directed "at a three or four or five year old, a preschooler," who is "not competent to understand the nature of the message" (*id.* at A-182 to A-183). The "Wall Street Journal" article simply quoted Mr. Pertschuk's November 1977 speech (*id.* at A-208). The "Newsweek" article included a quotation from the November 1977 speech and a statement that "[c]ommercialization of children has crept up on us without scrutiny or action" and that it was a "major, serious problem" as to which he was "committed to tak[e] action" (*id.* at A-217). The Chairman's remarks in the "TV Guide" interview did not differ in substance from those in the November 1977 speech (*id.* at A-201).

Chairman Pertschuk declined to disqualify himself, explaining that the statements relied on by the advertisers reflected only his tentative views on policy issues or legislative facts (Pet. App. A-122) and that "[t]he only issue I have judged is that the phenomenon of television advertising directed to children raises serious questions and merits a Commission inquiry" (*ibid.*). Chairman Pertschuk pledged that he "would base [his] conclusions, as to [the] issues, on the record of the hearings" (*id.* at A-125 to A-126). The Commission (Chairman Pertschuk and Commissioner Pitofsky not participating) thereafter denied the advertisers' motion to disqualify the Chairman (*id.* at A-111).[5]

2. The advertisers subsequently filed this action in the United States District Court for the District of Columbia seeking an injunction to prohibit Chairman Pertschuk from participating in the Children's Advertising Proceeding.[6] They initially relied on the statements of Mr. Pertschuk summarized above. They later submitted three additional memoranda[7]

[5] Commissioner Pitofsky has recused himself from participation in the Children's Advertising Proceeding.

[6] Petitioner Kellogg Co. intervened in that court.

[7] The memoranda, dated November 9, 1977, were sent to a journalist, the Chairman of the FCC, and Senator Ted Stevens. The Chairman's memorandum to the journalist referred to their mutual concern about "permitting children to be made commercial objects," and described the Chairman's ACT speech as an attempt to "establish underpinnings" for action on television advertising directed to children (Pet. App. A-198). The memorandum to the Chairman of the FCC de-

and a letter written by Chairman Pertschuk,[8] which had not been presented to the Chairman or the Commission.

The district court granted summary judgment in favor of petitioners. The court concluded that, because "[t]ypically * * * some aspects of every FTC rulemaking proceeding are adjudicative in nature" (Pet. App. 105), Chairman Pertschuk should be disqualified if "a disinterested observer may conclude that [he] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it" (Pet. App. A-104, quoting *Cinderella Career and Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)). The district court held that Chairman Pertschuk was disqualified under this

scribed the ACT speech in a similar manner (*id.* at A-199). (The FCC had previously considered taking regulatory action in the same field. See *Action for Children's Television* v. *FCC*, 564 F.2d 458 (D.C. Cir. 1977)). The memorandum to Senator Stevens thanked the Senator for his support and described the ACT speech as setting forth the "legal underpinnings—which I'm convinced are strong" for Commission action in the area of television advertising directed at children (Pet. App. A-200).

[8] The letter was written by the Chairman on November 17, 1977, to Chairman Kennedy of the Food and Drug Administration (*id.* at A-206). It referred to the conviction held by some, including Chairman Kennedy, that one of the evils flowing from unfair children's advertising "is the resulting distortion of children's perceptions of nutritional values" (*ibid.*). It also stated Chairman Pertschuk's belief that "the convergence of public policies regarding the commercial exploitation of children with the health controversy over sugared products" provided a strong basis for remedial action (*id.* at A-207).

standard because petitioners had made "a very substantial showing" that he had "conclusively prejudged factual issues which will be disputed in the rulemaking proceeding and whose resolution will be necessary for a fair determination of the rulemaking as a whole" (*id.* at A-106). The district court did not, however, cite any specific statements as evidence of "prejudgment." Nor did it identify any "factual issues" that Chairman Pertschuk had purportedly prejudged and that would necessarily be at issue in the rulemaking proceeding.

3. A divided panel of the court of appeals reversed (Pet. App. A-1 to A-99).[9] The court found that the November 1977 ACT speech was the most significant evidence proffered in support of Chairman Pertschuk's disqualification, and noted that the other materials submitted by petitioners generally derived from it (*id.* at A-39). The court found that the ACT speech constituted "discussion and perhaps advocacy, of the legal theory that might support exercise of the Commission's jurisdiction over children's advertising"

[9] The court concluded, contrary to the Commission's contention, that review of the Commission's disqualification decision need not await final agency action (*id.* at A-7 to A-11). Although recognizing that, "[a]s a general matter * * * challenges to agency action should not be heard until relevant administrative proceedings have been concluded" (*id.* at A-7), the court believed that it was appropriate to intervene here because (1) there were no "disputed factual issues that demand the creation of a better administrative record," and (2) the issue presented—"the prejudgment standard required by due process for section 18 rulemaking"—was "a pure question of law" (*id.* at A-8 to A-9).

(*id.* at A-41), but concluded that such discussion "is not sufficient to disqualify an administrator" (*ibid.*). The court recognized that, in discussing legal and policy considerations, Mr. Pertschuk "not unnaturally employed the factual assumptions that underlie the rationale for Commission action[,]" but that "he remained free, both in theory and in reality, to change his mind upon consideration of the presentations made by those who would be affected" (*ibid.*). The court also noted that the Chairman's remarks were made before the Commission voted to initiate the rulemaking proceeding. The court held that expression of tentative opinions at that time is not, without more, sufficient to establish that "an agency member cannot maintain an open mind during the hearing stage" (*id.* at A-44). The court added that such tentative judgments on proposed rules are contemplated by Section 18 of the FTC Act, since the very purpose of supplemental rulemaking hearings under that provision is to provide an opportunity for interested parties to challenge the assumptions on which the Commission is proposing to act (*id.* at A-44 to A-45).

In addition to disagreeing with the district court's conclusion that Chairman Pertschuk's remarks evidenced "prejudgment," the court of appeals also rejected the district court's standard for disqualification in this context. It observed that the district court had treated the present case as being substantially similar to an adjudicative proceeding, thus disregarding the fundamental distinction between rulemaking and adjudication under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* (*id.* at A-15 to A-17). Proceedings under Section 18 of the FTC Act, the court concluded, are rulemaking proceedings (*id.* at A-19 to A-27). The court noted that any questions of fact that would be subject to cross-examination and rebuttal testimony in the Children's Advertising Proceeding are questions of legislative fact, not questions of adjudicative fact (*id.* at A-19 to A-27). Because rulemaking alone is involved, the court explained, the Due Process Clause does not require procedural safeguards more elaborate than those prescribed by Congress (*id.* at A-27 to A-33). In view of the fact that the present case arises in a rulemaking context, the court held that its prior decision in the *Cinderella* case was inapposite (*id.* at A-19 to A-26, A-33 to A-37).

The appropriate standard for disqualification under Section 18, the court concluded, should accommodate the Commission's statutory duty to formulate preliminary views and discuss legislative facts, but avoid the frustration of statutory purpose that would result if "a Commission member had reached an irrevocable decision on whether a rule should be issued prior to the Commission's final action" (*id.* at A-38). Accordingly, the court held that "a Commissioner should be disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding" (*ibid.*). This standard of proof is necessary "to rebut the presumption of administrative

regularity" and to "permit rulemakers to carry out their proper policy-based functions while disqualifying those unable to consider meaningfully a section 18 hearing" (*id.* at A-38 to A-39).

Judge Leventhal joined the court's opinion (*id.* at A-49). He also stated in his concurring opinion that, because the courts of appeals have exclusive jurisdiction to review trade regulation rules promulgated under Section 18, those courts, rather than the district courts, should consider disqualification claims arising in such proceedings prior to entry of a final order (*id.* at A-54 to A-64).[10]

Judge MacKinnon dissented, concluding that the Chairman's remarks reflected actual prejudgment and bias (*id.* at A-77 to A-91). Judge MacKinnon also stated that the standard applied by the majority was inconsistent with the need for fair rulemaking under Section 18 of the FTC Act.[11]

3. On January 7, 1980, shortly after the court of appeals rendered its decision, Chairman Pertschuk

[10] Judge Leventhal would apply a mandamus standard in considering such claims. Because Judge Leventhal's jurisdictional views had not previously been announced, he concluded that it would be inappropriate to apply them retroactively in this case (*id.* at A-58 to A-59). Judge Tamm expressly (*id.* at A-10), and Judge MacKinnon implicitly (*id.* at A-77), concluded that the district court had jurisdiction in the present case.

[11] Judge MacKinnon would require that a party moving for the disqualification of a member of an administrative agency "show by a preponderance of the evidence that the decisionmaker could not participate fairly in the formulation of the rule because of substantial bias or prejudgment on any critical fact that must be resolved in such formulation" (*id.* at A-99).

announced that he was "withdrawing from the Children's Advertising rulemaking proceeding." He added that "I will not participate further in any Commission deliberations regarding that proceeding" (Pet. App. A-221).

On May 28, 1980, the President signed Pub. L. No. 96-252 which, in Section 11, provides (1) that any further action in the Commission's Children's Advertising Proceeding must be based on acts or practices that are "deceptive," rather than acts or practices that are "unfair"; and (2) that further proceedings in the Children's Advertising Proceeding are suspended until the Commission votes to publish the text of a proposed rule under the new standard prescribed by Congress. See H.R. Conf. Rep. No. 96-917, 96th Cong., 2d Sess. 6, 31-32 (1980).

ARGUMENT

The broad question of first impression presented by petitioners (79-1496 Pet. 25-42; 79-1501 Pet. 15-35) concerning the extent to which Commissioners of the Federal Trade Commission may publicly express preliminary views before the commencement of rulemaking proceedings under Section 18 of the FTC Act is not appropriate for consideration by the Court at this time.[12] In any event, the decision of

[12] The decision of the court of appeals does not conflict with that of any other court. We are unaware of any prior case in which disqualification of an agency member from a rulemaking proceeding was sought on the basis of remarks made prior to initiation of the proceeding.

the court of appeals is correct and further review is unwarranted.

1. Three different standards for disqualification of Commissioners from participation in rulemaking proceedings under Section 18 of the FTC Act have been articulated in this case: (1) the court of appeals' requirement of a clear and convincing showing of an unalterably closed mind on matters critical to the proceeding (Pet. App. A-38 to A-39); (2) the dissent's proposal that there must be proof by a preponderance of the evidence of substantial bias and prejudice on a critical fact that needs to be resolved in the rulemaking proceeding (Pet. App. A-99); and (3) the district court's proposal that there must be proof of some prejudgment of the facts and law in advance of the rulemaking hearing (*id.* at A-104 to A-105). All of these formulations presuppose the existence of some element of actual prejudgment. That, of course, raises a preliminary factual question turning on the evidentiary significance of Chairman Pertschuk's statements and the inferences to be drawn from those statements. Chairman Pertschuk has denied that he prejudged any factual or legal question in the present proceeding. He has stressed that his only judgment has been that the Commission should conduct an inquiry. The court of appeals agreed, finding an absence of prejudgment or bias (Pet. App. 45a-46a):

> The materials, as a whole, merely demonstrate that Pertschuk discussed a legal theory by which the Commission could adopt a rule, if circumstances warranted. The statements do not demonstrate that Chairman Pertschuk is unwilling or unable to consider rationally argument that a final rule is unncessary because children are either unharmed by sugared products or are able to understand advertising.

Since the court of appeals exhaustively explored this factual issue and found that Chairman Pertschuk was not guilty of "prejudgment," there is no reason for this Court to make yet another evaluation of the Chairman's statements.[18]

In any event, the court of appeals' evidentiary assessment is correct. The court found that the Chairman had merely explored relevant legal and policy considerations at a time prior to the Commission's announcement of its intention to conduct hearings. As the court pointed out, this is "the best time for a rulemaker to engage in dialogue with concerned

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[18] There is an additional reason for declining to review this factual question in the present case. All of Chairman Pertschuk's remarks were made with respect to a statutory provision—Section 5 of the FTC Act—which subsequently has been modified by legislation that changes the standard applicable in the Children's Advertising Proceeding. Thus, even assuming that the majority of the court below was unduly "bland" in characterizing Chairman Pertschuk's remarks (Pet. App. A-78), the present case presents a highly inappropriate vehicle for examining the legal significance of those remarks. The Commission's future rulemaking proceedings must focus on the possible "deceptive" nature of the advertising in question, not its "unfair" effect. As previously noted, most of Mr. Pertschuk's remarks were addressed to the "unfairness" issue.

citizens" (Pet. App. A-44). In order to discuss relevant legal and policy issues, the Chairman "not unnaturally employed the factual assumptions that underlie the rationale for Commission action" (Pet. App. A-43). "Chairman Pertschuk scarcely could have discussed the 'unfairness' doctrine without assuming for the purpose of discussion that some injury might result" (*id.* at A-44). Only by divorcing Mr. Pertschuk's statements from their context have petitioners attempted to convey the impression that he actually "prejudged" the issues in this rulemaking proceeding.

2. There is an additional reason for declining petitioners' invitation to review the factual question of prejudgment in this case. That is because the issue is presented in a vacuum. The Commission has not yet designated any question of disputed material fact in this proceeding. It would therefore be impossible for the Court to determine, in a concrete context, whether Chairman Pertschuk has actually "prejudged" any such issue.

The Children's Advertising Proceeding is a wide-ranging inquiry into many issues posed by television advertising directed to children (Pet. App. A-146 to A-152). Consistent with the broad scope of the inquiry, the Commission solicited and received comments on a variety of remedial alternatives and expressed its willingness to consider still others (*id.* at A-154). Although the Commission requested comments on 16 broadly phrased issues of fact, law and policy (Pet. App. A-154 to A-160), and also invited

interested persons to address "any questions of fact, law or policy which they feel may have bearing upon the proposed rule" (*id.* at A-154), the Commission has not yet specified which issues of material fact will be the subjects of Commission determination under Section 18 of the FTC Act. Thus, it is premature to attempt to determine—under any legal standard—whether the Chairman has prejudged factual issues that may later be raised in the Children's Advertising Proceeding.

3. Even if it were appropriate to attempt to analyze the prejudgment issue in the context of the present case, the decisions of this Court demonstrate that Chairman Pertschuk is not disqualified. This is true even if the present case is viewed, as the district court suggested, as an adjudicatory or quasi-adjudicatory proceeding. Even in adjudicatory proceedings, a decision-maker is not disqualified based on his expression of preliminary views on questions of law, policy or legislative fact. *FTC* v. *Cement Institute*, 333 U.S. 683 (1948); *United States* v. *Morgan*, 313 U.S. 409, 421 (1941). The issue of prejudgment arises in adjudicatory proceedings only if the administrator has decided before the hearing the specific adjudicative facts that are in controversy—*i.e.*, "who did what, where, when, how, and with what motive or intent." K. Davis, *Administrative Law Treatise* § 15.03 at 353 (1958). See, *e.g.*, *Cinderella Career and Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970); *American Cyanamid Co.* v. *FTC*, 363 F.2d 757 (6th Cir. 1966); and *Texaco* v. *FTC*,

336 F.2d 754 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965). In those cases, a Commissioner had made remarks showing prejudgment of specific factual issues that later came before him for adjudication. Here, in contrast, Chairman Pertschuk's statements were addressed to issues of law and policy and related questions of legislative fact—that is, the general factual assumptions that enable an administrator to evaluate problems in the industry in connection with the determination of future law and policy. See *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978); *American Airlines, Inc.* v. *CAB*, 359 F.2d 624 (D.C. Cir. 1966) (en banc). Commissioners are expected to have opinions on such matters.[14] Just as

[14] A primary purpose for creation of the Federal Trade Commission was to effectuate statutory policies through administrators whose point of view is in agreement with those policies. See K. Davis, *Administrative Law Treatise* § 12.01, at 134-138 (1958). Senate confirmation hearings frequently delve into Commissioners' personal beliefs on issues of law and policy. Indeed, the legislative history of the FTC Act demonstrates Congress' intent that Commissioners be familiar with the marketplace and the behavior of those persons and businesses affected by the operation of the agency. The Commission's responsibilities are committed to "a body specially competent to deal with them, by reason of information, experience, and careful study of the business and economic conditions of the industry affected." S. Rep. No. 597, 63d Cong., 2d Sess. 8-9 (1914). Service on the Commission "requires not only a conversant knowledge with finance and transportation, but also a very comprehensive knowledge of the practicable economic and legal aspects of the whole field of industry of the country, and exceptional experience, training, and judgment." *Id.* at 11.

courts "do not expect a Trade Commissioner to be neutral on anti-monopoly policies * * *" (*Texaco* v. *FTC*, *supra*, 336 F.2d at 764), there is no requirement that a Commissioner be passive in the face of advertising that may be unfair or deceptive.

4. Moreover, as the court of appeals correctly held, the present case involves rulemaking, not adjudication. In such a context, it is essential for Commissioners to form general preliminary views on the subject matter of the rulemaking proceeding. Congress has specifically required the Commission, prior to initiating a rulemaking proceeding under Section 18 of the FTC Act, to "publish a notice of proposed rulemaking *stating with particularity the reason for the proposed rule*" (15 U.S.C. 57a(b); emphasis supplied).[15] To fulfill this statutory mandate, Commissioners must develop tentative opinions on the general legal, factual and policy issues that are involved. Indeed, Congress afforded the right of cross-examination and rebuttal in Section 18 proceedings for the very purpose of allowing interested persons to challenge such preliminary views. See 15 U.S.C. 57a(c)(1)(B)).[16] Chairman Pertschuk's re-

[15] Section 18 thus differs significantly from other statutory provisions that require at most a "[g]eneral notice of proposed rulemaking." 5 U.S.C. 553(b).

[16] The Conference Report discussing Section 18 (H.R. Conf. Rep. No. 93-1606, 93d Cong., 2d Sess. 33 (1974)) clearly shows that Congress intended Commissioners to form tentative views about the general subject-matter of the rulemaking proceeding (emphasis supplied):

> It was the judgment of the conferees that more effective workable and meaningful rules will be promulgated

marks, made after the Commission's receipt of petitions for rulemaking but before the Commission voted to institute rulemaking proceedings, were thus entirely consistent with the objective of Section 18—which requires Commissioners to "formulate tentative judgments on suggested rules" (Pet. App. A-44).

In view of this statutory objective, the court of appeals correctly rejected petitioners' contention that the limited trial-type procedures applicable under Section 18 and the "substantial evidence" standard prescribed for judicial review transform the rulemaking hearing into an adjudicatory hearing. The "basic distinction between rulemaking and adjudication" is well established by the decisions of this Court. *United States* v. *Florida East Coast Ry.*, 410 U.S. 224, 244 (1973). Those decisions recognize the "distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other" (*id.* at 245). The Children's Advertising Proceeding is quintessentially legislative in nature: it seeks to formulate governmental policy regarding television advertising directed to children and to establish future standards of conduct. It does not seek to adjudicate disputed facts concerning the

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if persons affected by such rules have the opportunity afforded by the bill, by cross-examination and rebuttal evidence or other submissions, *to challenge the factual assumptions on which the Commission is proceeding and to show in what respect such assumptions are erroneous.*

past behavior of particular parties or to determine their rights and liabilities based on that conduct.[17]

The functions of agencies engaged in rulemaking differ fundamentally from those of agencies in-

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[17] The procedures used in Section 18 hearings cannot change the fundamental nature of those hearings (Pet. App. A-18). "Nothing in the legislative history or background of section 18 suggests * * * that Congress believed that the use of evidentiary hearings transformed the nature of the proceedings from rulemaking to adjudication * * *" (*Id.* at A-25). Legislative rulemaking may be carried out under a variety of different procedures without changing its essential nature. The Administrative Procedure Act provides that rulemaking may take place under either the informal procedures of 5 U.S.C. 553 or the formal procedures of 5 U.S.C. 556, 557. This depends not on the nature of the proceeding but rather on whether Congress has provided that the rulemaking should be "on the record." *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972). Section 18, like a number of other recently enacted rulemaking provisions (such as the Toxic Substances Control Act, 15 U.S.C. 2605(c); the Securities Act Amendments of 1975, 15 U.S.C. 78f(e)(4); the Clean Water Act of 1977, 33 U.S.C. (Supp. II) 1317(a)(2); and the Energy Policy and Conservation Act, 42 U.S.C. (Supp. II) 6306(a)(1)), elaborates somewhat on the procedures prescribed in 5 U.S.C. 553, but stops short of the procedural formalities imposed by 5 U.S.C. 556, 557.

Petitioner's reliance on Section 18(e)(3)(B), 15 U.S.C. 57a(e)(3)(B), which directs a reviewing court to consider whether the Commission, by excluding or limiting cross-examination or rebuttal, has "precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole," is entirely misplaced. Any such claim can be considered by a court on review of a final rule that may be adopted in the Children's Advertising Proceeding (15 U.S.C. 57a(e)(3)(B)), but it has no bearing on the question of "prejudgment" presented here.

volved in adjudication. Rulemaking provides agencies with a forum for soliciting public views "before embarking on a new course" (*NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)). To encourage public input, agency members must be able not merely to disclose the existence of petitions for rulemaking, but also to express freely their preliminary views and the data on which they rely. This encourages participation from all sectors of the public—including persons, such as petitioners, who vigorously oppose the adoption of new rules—and affords the agency the benefit of a full expression of opinion on the legislative facts that underlie proposed rules. As the court of appeals explained (Pet. App. A-34):

> The legitimate functions of a policy-maker, unlike an adjudicator, demand interchange and discussion about important issues. We must not impose judicial roles upon administrators when they perform functions very different from those of judges.

In light of these considerations, the court of appeals correctly concluded that "[t]he *Cinderella* view of a neutral and detached adjudicator is simply an inapposite role model for an administrator who must translate broad statutory commands into concrete social policies" (Pet. App. A-35).[18]

[18] Since Congress has prescribed the procedural safeguards that it deems appropriate in the context of a Section 18 proceeding, and has specified that Commissioners may (indeed should) formulate views about the subject matter of the proceeding prior to the commencement of hearings, the formulation of additional "safeguards" of the kind that petitioners advocate would conflict with the congressional purpose. In rulemaking proceedings, the Due Process Clause does not ordinarily demand procedural safeguards more rigorous than those prescribed by Congress. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 524 n.1, 542 n.16 (1978).

Moreover, in rulemaking, as in other forms of public administration, officials are presumed to have the capacity and willingness to reconsider their tentative views and assumptions in light of new evidence bearing on the issues before them. See *Withrow* v. *Larkin*, 421 U.S. 35, 55, 57 (1975); *Hortonville Joint School District* v. *Hortonville Education Assn.*, 426 U.S. 482, 493 (1976).[19] The presumption of a capacity and willingness to reconsider, and the congressional intent that Commissioners form tentative views before "embroil[ing] interested parties in a rulemaking proceeding" (Pet. App. A-52), clearly support the court of appeals' conclusion that a Commissioner should be disqualified only when clear and convincing evidence shows that he or she has an unalterably closed mind on matters central to the disposition of the proceeding.[20]

[19] As previously noted, even in the adjudicatory context, strongly expressed preliminary views, based on ex parte investigation, do "not necessarily mean that the minds of [Commission] members were irrevocably closed * * *." *FTC* v. *Cement Institute, supra*, 333 U.S. at 701. Accord, *United States* v. *Morgan, supra*, 313 U.S. at 421.

[20] Case law indicating that disqualification of judges may be warranted if the decision-maker has "a fixed opinion—'a closed mind on the merits of the case'" is entirely consistent

5. Finally, Chairman Pertschuk's withdrawal from the Children's Advertising Proceeding makes further review by this Court unnecessary. We agree with petitioners (79-1501 Pet. 31; 79-1496 Pet. 39), however, that the Chairman's decision to withdraw does not render the case "moot." Voluntary abandonment or cessation of particular conduct, undertaken after that conduct is challenged in a judicial proceeding, does not necessarily moot a controversy, particularly when the defendant does not agree that his conduct was improper. See *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953); *United States* v. *Concentrated Phosphate Export Association, Inc.*, 393 U.S. 199, 203 (1968); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 97-98 (1976). But as *Grant* makes clear, the absence of some "cognizable danger of recurrent violation" (345 U.S. at 633) eliminates the need for declaratory and injunctive relief of the kind that petitioners seek.[21]

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with the standard adopted by the court of appeals. See *United States* v. *Haldeman*, 559 F.2d 31, 131-136 (D.C. Cir. 1976) (en banc), cert. denied, 431 U.S. 933 (1977), quoting *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966).

[21] This case differs significantly from *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979), which held that a case may be moot if it appears that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." See also *SEC* v. *Medical Committee for Human Rights*, 404 U.S. 403 (1972); *Preiser* v. *Newkirk*, 422 U.S. 395 (1975). Despite his decision to recuse himself from this proceeding, it cannot be said with complete assurance that the "effects" of Chairman Pertschuk's statements have been "completely and irrevocably eradicated." In our view, Mr. Pertschuk's statements have not impermissibly affected the

In addition, Congress has removed from this proceeding the "unfairness" standard that was the focus of many of the challenged remarks of Chairman Pertschuk (see page 13, *supra*). By enacting Section 11 of Pub. L. No. 96-252, Congress suspended the Children's Advertising Proceeding until the Commission publishes the text of a proposed rule, which must be based solely on the "deceptive acts and practices" standard contained in Section 5(a) of the FTC Act, 15 U.S.C. 45(a). Thus, the Children's Advertising Proceeding will be conducted in the future under substantially different conditions. Further judicial review should await the outcome of that proceeding.

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rulemaking proceeding. If petitioners disagree, they may seek judicial review of any final rule adopted by the Commission—*i.e.*, they may exhaust their administrative remedies and appeal from a final administrative determination.

In sum, because the present case is not technically moot, the Court should not vacate the judgment of the court of appeals. Rather, it should deny the petitions for a writ of certiorari. We also note that even if a more substantial mootness issue were presented, it would not be appropriate to vacate the judgment of the court of appeals in the circumstances of the present case. As explained in our Brief in Opposition in *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978), when grounds for a suggestion of mootness arise after the judgment of the court of appeals, the petition for certiorari should be denied if the case does not present issues that would merit review had there continued to be a live controversy. 77-900 Br. 4-8. (We are serving a copy of our Brief in *Velsicol* on counsel for petitioners.) For the reasons discussed on pages 13-23, *supra*, the present case does not involve questions that would merit review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

NEIL H. KOSLOWE
Attorney

MICHAEL N. SOHN
General Counsel

HOWARD E. SHAPIRO
Deputy General Counsel

DAVID M. FITZGERALD
Attorney
Federal Trade Commission

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